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No. 92-1959

IN THE
*Supreme Court of the United States*
OCTOBER TERM, 1992

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, INC., *etc., et al.*,

*Petitioners,*

v.

DAN MORALES, Attorney General of Texas,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Fifth Circuit correctly directed the district court to abstain under the *Pullman* doctrine in circumstances where a religious organization and its officials claimed in federal court that a state law enforcement official's request that a state court order the church to produce forty-one types of documents in connection with the initial step of a state fraud investigation of the church's fundraising activities had the potential ultimately to so involve the state in church religious affairs that it might violate the church's First Amendment rights to freedom of religion and freedom from the establishment of religion?

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**BRIEF IN OPPOSITION**

Dan Morales, the respondent in his official capacity as Attorney General of Texas ("Attorney General"), requests that the Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's judgment in an opinion reported at 986 F.2d 962. The three petitioners are Word of Faith World Outreach Center Church, Inc., Reverend Robert Tilton, and Martha Phillips Tilton (collectively, "the Tiltons," "the church," or "Word of Faith").

## STATEMENT OF THE CASE

Word of Faith's portrait of this case is not a realistic one. It paints the Attorney General's preliminary steps toward investigation of church officials for possible fraud as an attempt to suppress the church's religious teachings. Because these preliminary state investigatory steps frame the Fifth Circuit's *Pullman* abstention order, they are outlined in some detail here as a way of addressing "misstatements of fact or law . . . which have a bearing on the question of what issues would properly be before the Court," Court Rule 15.

Among other things, this recitation of the facts demonstrates that the Attorney General has never tried to suppress Word of Faith's religious teachings. Fraud was and is the target, and the perpetration of fraud is not one of the church's religious tenets.

Founded in 1976, Word of Faith had accumulated by trial a 500,000 person mailing list and a membership of up to 13,000. It grossed $65 million in 1991 on an operating budget of $50 million. Tilton App. 2.

The principal event precipitating the church's involvement with the Attorney General was the ABC network's airing of a *PrimeTIME Live* program on television evangelists. The program's third segment focused on the Tiltons and their fundraising activities for Word of Faith and presented an "unflattering" picture of them. Tilton App. 2-3.[1]

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[1] On July 16, 1993, in a separate legal dispute, a federal district court denied Reverend Tilton's motion for a preliminary injunction against rebroadcasting or republishing parts of the third *PrimeTIME* segment. *Tilton v. Capital Cities/ABC Inc.*, No. 92-C-1032-B (N.D. Okla.).

The church and the Tiltons came under increased federal and state scrutiny following the airing of the *PrimeTIME* segment. Tilton App. 3; Tr. 6:78-79, 6:142. The Attorney General publicly announced that he was looking into whether the church was complying with state antifraud and nonprofit corporation laws which he enforces. Tr. 6:51; 6:75; 7:378-79.

A month and a half later, the Attorney General issued a formal civil investigative demand ("CID"), requesting production of fifty-five documentary items to help him evaluate whether the church's trade practices and charitable solicitations might violate the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). P.Ex. 23. Word of Faith did not produce the documents.[2] Instead, there followed a series of exchanges, both in the press and through correspondence, between church representatives and the Attorney General's office. *E.g.*, Tr. 7:411; P.Ex. 24, 34. The church and the Tiltons said that they wanted to meet to see if the Attorney General could convince them they should produce the documents; they also indicated that they intended to file a federal

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[2] The church and the Tiltons continue their resistance to document production requests in a setting that already has made its way to this Court. They recently sought mandamus protection from a Texas state district court discovery production order in a private suit. The Supreme Court of Texas denied the mandamus effort as to certain documents, while keeping other aspects of the dispute pending. *Tilton v. Moyé*, No. D-3902 (July 8, 1993). Justice Scalia denied a stay request by the church and the Tiltons. *Tilton v. Moyé*, No. A-30 (July 12, 1993). On July 9, 1993, the church and Reverend Tilton filed a federal section 1983 suit against the private plaintiff and the presiding judge in the state district court suit, claiming that production of certain documents would violate their First Amendment rights. *Tilton v. Smith*, Civ. Action No. 393-CV-1348p (N.D. Tex.). The district court in that suit denied a restraining order and dismissed the suit on July 19, 1993.

court suit on a specified day. The Attorney General became convinced that an impasse had been reached and the documents were not going to be produced voluntarily. Tilton App. 4.

Under authority of the state Miscellaneous Corporation Laws Act ("MCLA"), the Attorney General then filed a *quo warranto* suit in state probate court, seeking to compel production of the documents requested in the CID and, failing that, forfeiture of the church's corporate charter.[3] The probate court issued a show cause order and set the case for a hearing.

The day after issuance of the show cause order, the church and the Tiltons filed their federal suit to avoid production of the requested documents and enjoin the state court proceeding; they obtained a temporary restraining order which halted the state court proceedings. Tilton App. 5. As the case went to trial, the church and the Tiltons took the position that producing the requested documents would violate First Amendment rights of freedom of association, freedom of religion, and freedom from the establishment of religion. They also claimed that the Attorney General, who was sued in his official capacity only,[4] was unauthorized by state law (*i.e.*,

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[3] Later, after the district court judgment, the church voluntarily dissolved its corporate status. Texas law maintains a de facto form of post-dissolution corporate status for pre-dissolution activity. *See, e.g.*, Texas Non-Profit Corporation Act, TEX.CIV.STAT.ANN. art. 1396-6.06B (Vernon 1980); MCLA, TEX.CIV.STAT.ANN. art. 1302-5.09A (Vernon Supp. 1993).

[4] Word of Faith initially sued the Attorney General and several members of his staff both officially and individually, seeking monetary and injunctive relief. Shortly before trial, the complaint was amended, dropping all the staff members and explicitly dropping the individual-capacity part of the suit against the Attorney General. R. 2:199. This

the DTPA and MCLA) to undertake his investigation of the church

As the federal suit went to trial a month later, the Attorney General narrowed his state CID to forty-one items and modified the requested state court relief to production of the documents -- which always had been the objective of the state suit. The federal district court rebuffed the Attorney General's open-court effort and proceeded to find unconstitutional the very requests the Attorney General had abandoned -- but whose maintenance had been dictated by the court. Tilton App. 5 n.3; 16 & n.10. The district court also rejected the Attorney General's request that it abstain under the *Pullman* and *Younger* abstention doctrines. Tilton App. 30-34.

The district court's injunction against the Attorney General rested on both state and federal grounds. While rejecting the Attorney General's argument that the Eleventh Amendment *Pennhurst II* doctrine[5] invalidated

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intentional step requires treatment of this action as an official-capacity, not personal-capacity, one against the Attorney General. *Cf. Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (Court looks to course of trial proceedings to determine capacity *if* the complaint does "not clearly specify whether officials are sued personally, in their official capacity, or both").

5 *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The Fifth Circuit's Eleventh Amendment analysis essentially adopted the ultra vires rationale of *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). Tilton App. 9. *Pennhurst II* questions the "continued vitality" of the *Treasure Salvors* principle. 465 U.S. at 114 n.25. Denying certiorari here will avoid any possible need for the Court to revisit this Eleventh Amendment issue. In the case's present status, the Fifth Circuit's discussion of the Eleventh Amendment issue is merely dictum.

the state law ground for the injunction against the Attorney General, the Fifth Circuit nonetheless reversed the district court and overrode its injunction.

The Fifth Circuit found the abstention doctrine of *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), "tailor-made" for application in this case. Tilton App. 18. It determined that the "muddled presentation of the issues in this case . . . should make apparent the danger of a federal court's interfering at too early a stage, only to promulgate an advisory opinion." Tilton App. 17-18.

## REASONS FOR DENYING THE WRIT

### I.

### The *Pullman* abstention standard applied by the Fifth Circuit in this case is not in conflict with decisions by this Court or any other circuits.

The Fifth Circuit applied the *Pullman* abstention doctrine to what is effectively a discovery dispute over which documents should be produced in connection with a prior state court proceeding. Nothing in the doctrine's application in this case conflicts with this Court's precedents or decisions from other federal circuits which follow those precedents.

First, it must be recognized that this case does not present a First Amendment challenge to the facial validity of a state statute. Therefore, the principle that *Pullman* abstention should not be invoked in First Amendment facial challenges, *see City of Houston v. Hill*, 482 U.S. 451, 468 (1987), is inapplicable.

The facial constitutionality of the Texas DTPA and MCLA has never been at issue in this case. Those statutes are entirely neutral, and Word of Faith has never asserted their facial invalidity. (They are not even included in the "Statutory Provisions Involved" section of the certiorari petition.) Instead, Word of Faith has argued that the Attorney General's effort to investigate their applicability to the church, through his document request and state court action to enforce the request, threatens invasion of First Amendment associational and religious rights of the church's members.

Second, Word of Faith's argument that some past Fifth Circuit opinions have incorrectly stated and applied the *Pullman* abstention test is entirely academic. The court correctly stated and applied it *in this case*. In fact, the *Pullman* refrain that the state law must be unsettled and capable of construction in a way that might narrow or eliminate the federal constitutional issues suffuses the Fifth Circuit opinion. Quoting from an earlier en banc opinion, the court observes that the state law in question must be "fairly susceptible" of an interpretation that might avoid or substantially modify the federal constitutional question. Tilton App. 11. A few pages later, the court determines that "unsettled questions regarding the application of state law in this case . . . could have mooted the federal constitutional issue." Tilton App. 14. Still later in the opinion, the court highlights "the *many* unresolved state law issues in this case." Tilton App. 17 (emphasis added).

The Fifth Circuit's decision, both in words and deed, is a straightforward application of a straightforward reading of the *Pullman* doctrine. As the court stated, *Pullman* was "tailor-made" for application here. The court understood the potential for the state document production litigation to substantially narrow any constitutional issues which Word of Faith ultimately might

want or need to bring into federal court. There is no conflict at all between what the Fifth Circuit did here and what this Court has directed courts to do in applying the *Pullman* doctrine; likewise, there is no conflict between the Fifth Circuit decision and the rule of *Pullman* abstention used in every other federal circuit court of appeals.

## II.

### This case does not present any important questions of federal law that need to be settled by this Court.

The Fifth Circuit's abstention ruling authorizes no far-reaching action; its effect is limited to the peculiarities of its factual setting. It simply enables the Attorney General to seek state court permission to take the first step of an investigation into whether Word of Faith and the Tiltons have committed civil fraud (or some other transgression of state statutes) in connection with fundraising and related activities on behalf of the church.

Without necessarily referring to the issues as important ones of federal law, Word of Faith suggests that this case offers the Court an opportunity to reevaluate a criticized doctrine, to determine whether certification should have been initiated by the court instead of the *Pullman* abstention doctrine, and to decide whether some kind of bad faith precludes invocation of that doctrine even if it is otherwise applicable to a given litigation circumstance. Certainly as presented in this case thus far, none of these issues presents a question of importance for the Court to resolve.

Nothing in this case raises any questions about the continued viability or meaningfulness of the *Pullman* abstention doctrine. Indeed, the case demonstrates the opposite point. It highlights just how meaningful *Pullman*

abstention continues to be in enabling federal courts to avoid premature constitutional rulings Invoking the doctrine here means that federal courts will not have to engage in a series of factual surmises about what *might* happen at the end of a possible investigation of certain church activities for possible state law violations and then conclude whether those facts, should they ever come to pass, would raise valid First Amendment concerns. This case teaches a clear lesson about the inadvisability of a retreat from *Pullman*.

Besides, the Court has shown no inclination to retreat from *Pullman* as a way to honor federalism and the limits of federal judicial power. Just this term, the Court has cited *Pullman* approvingly and given its underlying principles specialized application in the reapportionment context. *See Growe v. Emison*, 113 S.Ct. 1075, 1080 (1993).

Similarly, this case is hardly the appropriate one for teaching lower courts about the benefits of state certification procedures. Word of Faith, not the Attorney General, chose to pursue this litigation in federal court and raise there so many state law questions. Adopting a litigation strategy that belies their current espousal of the benefits of certification, the church and the Tiltons did not even mention certification in their briefs and oral argument to the Fifth Circuit. The first time the question appears is in the church's motion for rehearing, too late for serious appellate consideration by the Fifth Circuit, *see Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990) (generally, party may not raise an argument for the first time in a petition for rehearing). As a leading federal court commentary states: "[T]he failure of a party to suggest certification until a late stage in the proceeding considerably weakens his insistence on certification." Wright, Miller & Cooper, 17A FEDERAL PRACTICE AND PROCEDURE § 4248 at 16 (Supp. 1993).

There is an additional flaw in Word of Faith's certification argument. The circumstances of this case do not lend themselves to encapsulation in a reasonably succinct statement of settled facts for presentation to the Supreme Court of Texas. Forty-one categories of documents are requested, but the number the state courts might require produced under state law is presently unknowable. The investigation has barely begun, having been judicially halted in mid-step as the state court process for obtaining the requested documents was just getting underway. The future turns the investigation might take are matters of pure speculation. Framing a factual summary for presentation to the state's highest court is an impossibility in such a situation as this, thereby making certification inappropriate. Wright, Miller & Cooper, 17A FEDERAL PRACTICE AND PROCEDURE § 4248 at 174 (1988) (certification inappropriate if "there are a number of disputed factual issues making it difficult or impossible to agree on what the legal questions are").

Finally, the Fifth Circuit's ruling that *Younger* bad faith issues are inapplicable in *Pullman* abstention settings, Tilton App. 16-17 n.10, raises no consequential or important federal issues worthy of this Court's attention. No court has ever indicated that the law is any different than it was laid down by the Fifth Circuit in this case.

More critical on this point, as the Fifth Circuit explicitly noted, is the fact that the district court's bad faith concerns focused upon the very requests from which the Attorney General had receded only to be rebuffed by the district court. In this regard, the Fifth Circuit noted that, even if *Younger* and *Pullman* exceptions were identical (which they are not) and even if the district

court had so treated them (which it did not),[6] "the Attorney General's modified request presents no continuing constitutional violation justifying the 'extraordinary' exception to *Pullman*[.]" Tilton App. 17 n.10.

The district court's rebuff of the Attorney General's effort to narrow the document discovery dispute in state court was an aberrational extension of federal judicial power into speculative realms; the Fifth Circuit's reversal of the district court's speculation-laden injunction was not. *See Morales v. TWA*, 112 S.Ct. 2031, 2036 (1992) ("a conjectural injury cannot warrant equitable relief"); *cf. DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (observing the practice of federal court acceptance of solemn commitments by state attorneys general).

As a practical matter, concluding this case through denial of certiorari is the only important federalism principle raised by this case. Only then can the state courts begin to sort out the state law boundaries of the Attorney General's investigatory powers under the DTPA and the MCLA; only then can the state court denouement be reached so that there can be a concrete determination (by the church itself or by a federal court should the matter be presented to it) whether Word of Faith has any arguable residue of a First Amendment complaint about the outcome of the state proceedings.

## CONCLUSION

For the foregoing reasons, the Court should deny the request to issue a writ of certiorari to review the Fifth Circuit's judgment reversing the district court injunction and ordering abstention.

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6 "We do not understand the district court to have rejected *Pullman* . . . on the basis of the Attorney General's bad faith[.]" Tilton App. 17 n.10.

Respectfully submitted,

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